

1 original jurisdiction over "all civil actions where the matter in
2 controversy exceeds the sum or value of \$75,000, exclusive of
3 interest and costs, and is between . . . citizens of different
4 States." 28 U.S.C. § 1332(a)(1). Section 1441(a) provides that "any
5 civil action brought in a State court of which the district courts
6 of the United States have original jurisdiction may be removed by
7 the defendant or defendants, to the district court of the United
8 States for the district and division embracing the place where such
9 action is pending." 28 U.S.C. § 1441(a). Section 1447(c) provides,
10 "If at any time before final judgment it appears that the district
11 court lacks subject matter jurisdiction, the case shall be
12 remanded." 28 U.S.C. § 1447(c). The removal statute is strictly
13 construed against removal jurisdiction, and "[f]ederal jurisdiction
14 must be rejected if there is any doubt as to the right of removal
15 in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th
16 Cir. 1992).

17 Section 1332 requires complete diversity, meaning that each
18 plaintiff must be a citizen of a different state than each
19 defendant. *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1095 (9th
20 Cir. 2004). Plaintiff is a citizen of Nevada, and defendant AC is a
21 citizen of Oklahoma. Although it is undisputed that defendant
22 Pezonella is also citizen of Nevada, AC asserts that the court
23 should not consider Pezonella's citizenship as it is not a viable
24 defendant. AC sets forth two bases for this conclusion.

25 First, AC asserts that plaintiff did not timely serve
26 Pezonella under Rule 4(m) of the Federal Rules of Civil Procedure
27 or Rule 4(i) of the Nevada Rules of Civil Procedure. Thus, AC
28 argues, plaintiff is incapable of proceeding against Pezonella on

1 this complaint. Rules 4(m) and 4(i) require service of the summons
2 and complaint upon a defendant within 120 days after filing the
3 complaint. Failure to timely serve will result in the dismissal of
4 a defendant unless for good cause shown the court extends the
5 deadline for service. Plaintiff filed its complaint on November 10,
6 2010. The deadline to serve Pezonella was therefore March 10, 2011.
7 Plaintiff served Pezonella on March 7, 2011, within the 120-day
8 deadline. (Doc. #18). Accordingly, because plaintiff timely served
9 Pezonella, AC's argument that Pezonella is not a viable defendant
10 because it has not been timely served is moot.

11 AC also appears to argue that because Pezonella had not been
12 served at the time of removal, its citizenship does not factor into
13 the diversity determination. However, the law is clear that the
14 citizenship of unserved defendants must be considered in
15 determining whether complete diversity exists in a removed action.
16 *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1266 n.4 (9th
17 Cir. 1992) (citing *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d
18 1174, 1176 (9th Cir. 1969)) (original emphasis omitted) (A
19 defendant cannot "ignore an unserved, nondiverse co-defendant in
20 seeking to remove a case to federal court based on diversity.");
21 see also *Hoskinson v. Alza Corp.*, 2010 WL 2652467, at *1 (E.D. Cal.
22 2010). Accordingly, this argument is without merit.

23 Second, AC asserts that Pezonella has been fraudulently
24 joined. A nondiverse defendant will not destroy complete diversity
25 if the defendant was fraudulently joined. *Morris v. Princess*
26 *Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). Fraudulent
27 joinder will be found where "the plaintiff fails to state a cause
28 of action against a resident defendant, and the failure is obvious

1 according to the settled rules of the state." *Hunter v. Philip*
2 *Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009) (internal
3 punctuation omitted). While the removing party is entitled to
4 present facts showing the joinder to be fraudulent, the court does
5 not consider whether the resident defendant could propound a
6 defense to an otherwise valid cause of action. *Ritchey v. Upjohn*
7 *Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). The general
8 presumption is against fraudulent joinder. *Hamilton Materials, Inc.*
9 *v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

10 Plaintiff named both Pezonella and AC in an earlier
11 construction defect complaint filed in state court and based on the
12 same facts underlying this case. Both Pezonella and AC are design
13 professionals. AC moved to dismiss the complaint on the grounds
14 that plaintiff had not complied with Nev. Rev. Stat. § 40.6884(1),
15 which requires that the first pleading in a construction defect
16 action against a design professional include an affidavit of merit.
17 Pezonella joined in the motion to dismiss. The state court granted
18 AC's motion to dismiss, holding that a complaint lacking the
19 required affidavit is void *ab initio*. The court denied plaintiff
20 leave to amend because a complaint void *ab initio* does not exist
21 and thus cannot be amended. The court's order did not mention
22 Pezonella or its joinder in the motion to dismiss.

23 Final judgment was entered in AC's favor on December 22, 2010.
24 As of the date of removal and of plaintiff's service on Pezonella,
25 no final judgment had been entered in Pezonella's favor. On March
26 4, 2011, Pezonella moved in state court for the entry of final
27 judgment on the grounds that it had joined in AC's motion to
28 dismiss and was also a design professional.

1 Defendants argue that the complaint in this case "is not
2 capable of commencing an action against Pezonella" because at the
3 time of service Pezonella was still an active defendant in the
4 prior state court case. Defendants argue that Pezonella could not
5 therefore be served with the complaint in this case "as it would
6 subject Pezonella to two concurrent state court actions by
7 Plaintiff based on the same transactions and occurrences." (AC
8 Opp'n 5:15-16); (Pezonella Joinder to Mot. to Dismiss 2:11-15).

9 Neither defendant cites any law to support this proposition,
10 and the court can find none. Indeed, when a plaintiff files two
11 complaints against the same defendant based on the same facts, the
12 court is presented with arguments based on res judicata, collateral
13 estoppel, or comity. Even if the defendants are correct in their
14 conclusory assertion, however, such law is by no means "obvious
15 according to the settled rules" of Nevada.

16 Plaintiff's complaint states a claim against Pezonella for
17 construction defect. Moreover, notwithstanding the service issues,
18 it is clear that Pezonella is both factually and legally a proper
19 party to the action. Plaintiff's understanding of the import of the
20 state court's order dismissing AC - that it declared the complaint
21 void as to all design professionals in that action, including
22 Pezonella - was reasonable and is no basis for finding the joinder
23 of Pezonella fraudulent.

24 At the most, defendants' arguments present defenses to the
25 otherwise legitimate claims asserted by plaintiff against
26 Pezonella. As noted, these defenses are not considered when
27 determining whether the plaintiff has stated a claim against the
28 resident defendant. AC has failed to carry its burden to establish

1 fraudulent joinder.² Pezonella is thus a legitimate and proper
2 defendant to this action. Its presence therefore destroys complete
3 diversity and strips this court of subject matter jurisdiction.

4 Finally, AC argues that plaintiff has waived its right to
5 object to this court's jurisdiction by obtaining summonses,
6 opposing the motion to dismiss, and dismissing one of the
7 defendants while in this court. Regardless of the parties' actions,
8 however, "the defense of lack of subject matter jurisdiction cannot
9 be waived, and the court is under a continuing duty to dismiss an
10 action whenever it appears that" it lacks jurisdiction. *Augustine*
11 *v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); see also 28
12 U.S.C. § 1447(c). Because the court concludes that Pezonella was
13 not fraudulently joined, there is no diversity of jurisdiction
14 under § 1332. The court therefore does not have subject matter
15 jurisdiction over this case, and it must be remanded.

16 Accordingly, the plaintiff's motion to remand (#8) is granted.
17 This action is hereby remanded to the Second Judicial District
18 Court of Nevada in and for the County of Washoe.

19 IT IS SO ORDERED.

20 DATED: This 12th day of April, 2011.

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22 UNITED STATES DISTRICT JUDGE
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28 ² The court finds the parties arguments regarding Nev. Rev. Stat. § 11.500 to be irrelevant to its determination of the motion to remand.